

**UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13**

STEPPENWOLF THEATRE COMPANY

Employer

And

Case 13-RC-20942

THEATRICAL STAGE EMPLOYEES UNION, LOCAL NO. 2,
I.A.T.S.E. AND UNITED SCENIC ARTISTS, LOCAL USA-829, I.A.T.S.E.

Joint Petitioners

SUPPLEMENTAL DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a Decision and Direction of Election issued April 3, 2003.¹ After Petitioner filed a request for review, the Board remanded the matter to the undersigned on June 18, 2004.² *Steppenwolf Theatre Co.*, 342 NLRB No. Pursuant to this remand, a Supplemental hearing was held on August 5 and 6, 2004, before a hearing officer of the National Labor Relations Board, herein referred to as the Board, to determine whether it is appropriate to conduct an election in light of the issues raised by the parties.³

¹Administrative notice is taken of and consideration has been given to the transcripts, exhibits, post-hearing briefs and briefs filed in relation to the Board's review of the Regional Director's initial decision.

² The original decision found that four of six department heads (scenery, electric, properties and wardrobe/costume departments) were supervisors within the meaning of the Act; Costume Exchange employees were excluded from the Unit; the Assistant to the Production Manager was allowed to vote subject to challenge and that the proper voting eligibility formula was that set forth in *Juilliard School*, 208 NLRB 153. The Joint Petitioners requested the Board review that Decision on two issues: the Regional Director's application of the *Juilliard School* eligibility formula and the finding that certain of the Employer's department heads were statutory supervisors. The Board granted Petitioner's request for review with respect to the application of the *Juilliard* formula only noting that because the Joint Petitioner's request for review regarding department heads raised substantial issues, those department heads at issue be voted subject to challenge. Ultimately the Board reversed the Regional Director's application of the *Juilliard* formula remanding the case to the Region for application of the eligibility formula set forth in *Davison-Paxon Co.*, 185 NLRB 21 (1970).

³ Upon the entire record in this proceeding, the undersigned finds:

- a. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
- b. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.
- c. The labor organizations involved claim to represent certain employees of the Employer.
- d. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Sections 2(6) and (7) of the Act.

I. Issues

The Employer maintains that all six department heads are supervisors within the meaning of the Act and therefore should be excluded from the Unit.⁴ The Employer further contends that the Assistant to the Production Manager, Carrie Vassilev, should be found to be an eligible voter. Additionally, the Employer contends that the Unit should include all costume department employees now employed by the Employer, which includes those employees who previously were employed by the Costume Exchange. Finally, the Employer maintains, as it did at the original hearing, that the proper eligibility formula is that set forth in *Juilliard School*, 208 NLRB 153.

The Joint Petitioner maintains that the Employer failed to present evidence of changed circumstances in the Employer's business sufficient to alter the findings in the Region's original Decision as amended by the Board's Order.

II. Decision

Based upon the record⁵ and arguments of the parties as more fully discussed below I find that each of the Employer's six department heads are supervisors and shall be excluded from the Act. Record evidence fails to establish that the Assistant to the Production Manager shares a community of interest with the agreed upon bargaining unit sufficient to mandate her inclusion in the Unit; the Employer's costume department employees are part of the described unit and are therefore eligible to vote; and the proper eligibility formula to be utilized is that set forth by the Board in *Davison-Paxon, Co.*, 185 NLRB 21, 24 (1970).

Accordingly, IT IS HEREBY ORDERED that an election be conducted⁶ under the direction of the Regional Director for Region 13 in the following bargaining unit:

All full-time and regular part-time production employees including carpenters, electricians, scenic artists (painters), properties employees, sound employees, costume employees, wardrobe employees and running crew employees, employed by the Employer at its facilities currently located at 1650 North Halsted, 1010 North Kolmar and 758 West North Avenue, Chicago, Illinois; but excluding all office clerical employees, confidential employees, interns, temporary employees, guards and supervisors as defined in the Act.

III. ISSUES AND ANALYSIS:⁷

⁴ Specifically, the Employer maintains that the following individuals should be excluded because they are supervisors: Scenery Department, Russell Poole; Sound/Audio Department, Martha Wegener; Electrical, J.R. Lederle; Properties, Jim Lichon; Wardrobe/Costumes, Caryn Klein; and Running Crew, Rick Haefele.

⁵ This includes transcripts from the initial hearing conducted February 18, 21, and 28, 2003 in addition to transcripts from the instant hearing conducted August 5 and 6, 2004.

⁶ In accordance with the Board's order that this case be remanded to the Region for application of the *Davison-Paxon* formula, the election conducted May 6, 2003 is hereby nullified. The ballots, which were impounded from that election, will be destroyed upon final conclusion of the instant matter.

⁷ Background facts regarding the Employer's business operations are set forth in the Regional Director's initial Decision and the Board's Order in the instant matter. Relevant changes to those facts will be noted and discussed as necessary throughout the Issues and Analysis section of this Supplemental Decision.

Supervisory Status of Department Heads

As noted previously, I find that the underlying record establishes that each of the Employer's six department heads are supervisors within the meaning of the Act and are therefore excluded from the Unit.

Section 2(11) of the Act confers supervisory status upon individuals having the authority in the interest of the employer to, among other indicia hire, assign or responsibly direct other employees. The Board has found that the exercise of any one of these types of authority is sufficient to confer supervisory status with the caveat that such authority be exercised "with independent judgment on behalf of management and not in a routine or sporadic manner" *International Center for Integrative Studies/The Door*, 297 NLRB 601 (1990); *Harborside Healthcare, Inc.*, 330 NLRB 1334 (2000).

During the instant hearing, the Employer presented evidence showing that the Employer's business operations changed since the last hearing with regard to the supervisory authority granted to its department heads. Initially during the first proceeding in this matter, neither party contended that Rick Haefele, who at the time worked as the master carpenter in the Scenery Department, was a supervisor within the meaning of the Act. Due to changes in the Employer's upper management, which resulted in changes in the Employer's business operations, Haefele now has the authority to hire full-time employees for the running crew and directs such employees using independent judgment in so doing. Specifically, since the previous hearing, Haefele was given the authority to recruit, interview and hire a new assistant for himself and in fact has exercised such authority. Inasmuch as the record shows that Haefele has exercised his authority to hire employees, as well as independently direct employees on his crew, I find that Haefele is a supervisor within the meaning of the Act and is therefore, excluded from the Unit.

In the initial Decision the Regional Director found that record evidence from the first hearing was insufficient to establish that Wegener, the head of the Audio department was a supervisor within the meaning of Section 2(11) of the Act. In presenting evidence of changed circumstances in the Employer's business operations during the instant proceeding, the Employer testified that Wegener has been given independent authority to hire her part-time staff for the upcoming season. In so doing, the Employer testified that Wegener has already selected, hired and scheduled her staff independently without seeking approval prior to their selection and hire. The exercise of such independent authority demonstrates that Wegener is a supervisor within the meaning of the Act and is therefore excluded from the Unit.

In the initial Decision, the Regional Director found that the individuals heading the Scenery, Properties, Electrical, and Costume/Wardrobe Departments were supervisors and therefore excluded from the Unit.⁸ No evidence was presented during the instant proceeding which would contradict those findings. Accordingly, I affirm the conclusion from the initial decision finding that the department heads in the Scenery, Properties, Electrical and

⁸ Currently these positions are held by Poole, Lichon, Lederle and Klein respectively.

Costume/Wardrobe Departments are supervisors within the meaning of the Act and are therefore excluded from the Unit.

Assistant to the Production Manager:

In the post-hearing brief filed by the Joint Petitioner after the initial hearing, the Joint Petitioner took the position that the Assistant to the Production Manager should be excluded from the Unit because her job duties and responsibilities did not fall under any of the classifications agreed upon by the parties to be included in the Unit, those being carpenters, electricians, scenic artists (painters), properties employees, sound employees, costume employees, wardrobe employees and running crew. The Joint Petitioner further contended that the assistant to the production manager's duties were largely clerical in nature; that she lacked a community of interest with the Employer's production employees and should therefore be excluded from the Unit. The Employer did not take a position with respect to the inclusion or exclusion of the production assistant during the initial proceeding. The Regional Director found insufficient evidence to allow determination of the assistant's job duties, skills and community of interest with other production employees and therefore found that the assistant would be allowed to vote subject to challenge.

In the instant proceeding, the Employer acknowledged that there were no changed circumstances regarding the duties of the Assistant to the Production Manager and further acceded that this position was not within any of the six departments included in the Unit. In so doing, the Employer presented testimony showing that Carrie Vassilev, the current Assistant to the Production Manager was separately supervised by Al Franklin, the Production Manager and was responsible for assisting Franklin with clerical aspects of production work, i.e. paperwork. While the instant record purported to show that Vassilev had on one occasion been involved in set up work for a Steppenwolf production at a venue other than the locations included in the agreed upon bargaining unit⁹, the record failed to clearly establish whether she performed this work with other bargaining unit members or was supervised by any of the heads of departments included in the unit. Because record evidence fails to establish that the production assistant works directly on a regular basis with employees in the Unit performing bargaining unit work; and further tends to show that the Assistant to the Production Manager is separately supervised by a department not explicitly included in the unit and primarily performs duties clerical in nature, I find that the Assistant to the Production Manager lacks a community of interest sufficient to mandate her inclusion in the bargaining unit. Accordingly I find that the Assistant to the Production Manager is ineligible to vote.

Costume Department Employees

Both at the time of the previous hearing and currently, the Employer's wardrobe department was housed in the administrative office building located at 758 W. North Avenue. The Employer's employees working in the Employer's costume/wardrobe department are explicitly included in the agreed-upon unit and no party argues to the contrary. At the time of

⁹ Vassilev assisted in moving a Steppenwolf production to Theatre on the Lake, located at 2400 N. Lakeshore Drive. The agreed upon bargaining unit descriptions includes the Employer's production employees located at 1650 North Halstead, 1010 North Kolmar and 758 West North Avenue.

the previous hearing, that location also housed the “Costume Exchange.” The Costume Exchange was a separate corporate entity apart from the Employer, which contracted, with the Employer to supplement the Employer’s wardrobe/costume needs. The previous record demonstrated Costume Exchange employees were not directly hired, supervised or paid by the Employer, and further, that the Employer did not establish any of the terms and conditions of employment that applied to Costume Exchange employees. Accordingly, the Regional Director found that individuals employed by the Costume Exchange were not included in the Unit.

Subsequent to the previous hearing, in or around the end of July 2004, the Employer concluded the phased-in purchase and acquisition of the Costume Exchange absorbing all of the employees formerly employed by the Costume Exchange.¹⁰ In this regard, the Employer and Costume Exchange had entered into a four-phase agreement in November 2001, wherein the Employer would gradually buyout and absorb all of the Costume Exchange’s business operations. No evidence was presented demonstrating that this agreement or process was instigated for reasons other than legitimate business considerations. The four-phased process was to be completed no later than August 31, 2004. Due to production demands and various other business considerations, the transaction was complete prior to the August 31, 2004 deadline, in or around the end of July 2004 at which time the former two full-time Costume Exchange employees began working for the Employer. Inasmuch as the parties previously agreed that the Employer’s wardrobe and costume department employees are specifically included in the Unit, former Costume Exchange employees working for the Employer in the Employer’s wardrobe/costume department as of the eligibility cutoff date will be eligible to vote.¹¹

Voting Eligibility Formula:

In remanding the instant matter, the Board reversed the prior Decision of the Regional Director, which had applied the *Juilliard* eligibility formula to determine the eligibility of part time employees to vote in the election. In so doing, the Board explicitly ordered the Regional Director to apply the *Davison-Paxon* formula to the instant situation.

Contrary to the Board’s clear directive, the Employer takes the position that due to “changed circumstances” application of the *Davison-Paxon* formula is improper inasmuch as such application would purportedly disenfranchise a substantial number of part time employees. The Employer continues to maintain, as it had during the prior hearing, that the eligibility

¹⁰ At the time of the instant hearing, the two full-time employees who had previously been working for the Costume Exchange were employed by the Employer in its wardrobe department as a result of the Employer’s acquisition of the Costume Exchange near the end of July 2004.

¹¹ Joint Petitioner argues that the eligibility date should be the last payroll period prior to the Board’s Decision and Order, which issued June 18, 2004. In support of this argument, Joint Petitioner notes that in situations in which a re-run election has been directed by the Board, the eligibility cutoff date is the payroll period preceding the date of the Notice of Election that the Region would immediately issue following the Board’s order. However, in this instance, the Board did not direct a re-run election. Rather, the Board remanded the case to the Region for application of the *Davison-Paxon* formula. Accordingly, as previously noted herein, in applying this formula I have nullified the election which was held on May 6, 2003, and direct an election utilizing the *Davison-Paxon* formula. Eligible to vote are therefore those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

formula set forth in *Juilliard School* 208 NLRB 153, 155 (1974) should be applied to the Employer's part time production employees to determine their eligibility to vote.

In support of its position, the Employer now maintains that the percentage of work performed by part time employees has significantly increased since the prior hearing was conducted in February of 2003. At the time of the prior hearing in February of 2003, the record established that approximately 30% of production department work was performed by part time employees. The Employer now maintains that 52% of the "overall work in the production departments is performed by part times." The Employer's new estimate is however based on a flawed formula, which included hours worked by part time non-bargaining unit classifications, which inflated the percentage. Thus, the Employer improperly included part time hours worked by designers, assistant designers, stage managers and assistant stage managers in its calculations, none of whom are included in the bargaining unit. Record evidence demonstrated that without including the part time hours from those classifications specifically excluded from the bargaining unit, part time employees performed approximately 35% of the bargaining unit work over the past twelve month period. This insignificant difference in the estimated percentage of production work performed by part time employees does not constitute changed circumstances sufficient to require the application of the *Juilliard* eligibility formula to the Employer's part time employees.

Further, even assuming that the Employer's erroneously inflated estimate of work performed by part time production employees was correct, the Board did not exclusively rely upon the percentage of work performed by part time employees in directing that the *Davison-Paxon* formula be utilized to determine part time employee eligibility. Rather, the Board considered the Employer's substantially greater size and regularity of operations as well as the "much higher number of hours worked by many individuals in its (the Employer's) part time staff" as factors rendering the formula found to be applicable to the small infrequent operations present in *Juilliard School* inappropriate in the instant case.

Inasmuch as the Employer failed to demonstrate changed circumstances sufficient to render the Board's directive to apply the *Davison-Paxon* formula inappropriate, I shall apply such formula to determine the eligibility of the Employer's part time production employees.

Accordingly, any unit employee who has averaged four hours per week in the three-month period preceding this Decision and Direction of Election is eligible to vote.

IV. Direction of Election

An election by secret ballot shall be conducted by the undersigned among the employees in the unit(s) found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit(s) who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are any employees who regularly average 4 hours or more per week for the last quarter prior to the eligibility date. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike, which commenced less than 12 months before the election date, employees engaged in such strikes who

have retained their status, as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by

V. Notices of Election

Please be advised that the Board has adopted a rule requiring election notices to be posted by the Employer at least three working days prior to an election. If the Employer has not received the notice of election at least five working days prior to the election date, please contact the Board Agent assigned to the case or the election clerk.

A party shall be estopped from objecting to the non-posting of notices if it is responsible for the non-posting. An employer shall be deemed to have received copies of the election notices unless it notifies the Regional Office at least five working days prior to 12:01a.m. of the day of the election that it has not received the notices. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure of the Employer to comply with these posting rules shall be grounds for setting aside the election whenever proper objections are filed.

VI. List of Voters

To insure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is directed that 2 copies of an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of this Decision. *North Macon Health Care Facility*, 315 NLRB 359, fn. 17 (1994). The Regional Director shall make this list available to all parties to the election. In order to be timely filed, such list must be received in Region 13's Office, Suite 800, 200 West Adams Street, Chicago, Illinois, 60606 on or before September 7, 2004. No extension of time to file this list will be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

VII. Right to Request Review

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street NW, Washington, DC 20005-3419. This request must be received by the Board in Washington by **September 14, 2004**.

DATED at Chicago, Illinois this 31st, day of August 2004.

Roberto G. Chavarry, Regional Director
National Labor Relations Board
Region 13
200 West Adams Street, Suite 800
Chicago, Illinois 60606

CATS — Voter Elig. -Statutry Exclusion-Sups, Guard
Unit – Other Scope/Definition
Voter Eligibility – Other

Blue Book 362-6734
460-5067-8200
177-8520
177-8560
401-2500
401-7500

H:\R13COM\Regional Document Archive\Pre-election decisions\RC-20942.doc 8/30/2004 1:47 PM